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REPORTS

OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

Lee Puey Hwa v Tay Cheow Seng

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 31 OF 1989
YONG PUNG HOW CJ, THEAN AND CHAN SEK KEONG JJ
8 JULY 1991

Family Law — Divorce — Lump sum payment — Factors to be considered in deciding whether to order a lump sum payment — Women's Charter (Cap 353, 1985 Ed), s 109(1) & (2)

The respondent was granted a decree nisi on 4 September 1985 and on 23 December 1985 this was made absolute. In 1987, when a summons taken out by the appellant was part-heard, maintenance was increased by Lai Kew Chai J from $1,000 to $1,400, and the house in which the appellant and their daughter were living was transferred to the appellant and the daughter as tenants in common in equal shares. The respondent was also ordered to pay for all the outgoings for the house. At the adjourned hearing of the part-heard summons, the learned judge increased the appellant's maintenance from $1,400 per month to $1,800 per month, but relieved the respondent from his previous liability for the outgoings of No 14 Clover Way (see [1989] 3 MLJ 99). The appellant appeals against this order and asks for an order for the payment of $760,347 by way of a lump sum and, pending payment, that the monthly maintenance should be kept up, and should not be less than $3,000 per month.

Held, dismissing the appeal:

(1) In making his order, the learned judge had already taken into account all the circumstances, financial or otherwise, of the parties. The appellant had produced no evidence to support the claim for $3,000 per month. On the other hand, the respondent had since remarried and has two sons, who were at that time 16 and 19 years of age; the respondent had a maintenance order made against him recently to pay his wife and two sons a total of $3,500 maintenance per month and regard had to be given to his responsibilities to his other family.

(2) In deciding whether to order a lump sum payment, the court should consider the individual circumstances of the parties, particularly the needs of the wife and the obligations and responsibilities of the husband, in addition to his assets, his earning capacity and other available resources. An order for a lump sum should not be made if the husband does not have adequate cash or other capital assets which can be readily disposed of, or if the lump sum payment or the disposal of assets will effectively cripple his earning power.

(3) In this case, having regard to all the evidence, including the fact that the respondent is not working, that he is now saddled with another maintenance order for his other family and that the assets in the private companies are not easily disposable, the court was of the opinion that the maintenance ordered by the judge is not manifestly inadequate.

Cases referred to

1 *Robinson* v *Robinson* [1982] 2 All ER 699; [1983] 4 FLR 102 (refd)
2 *Livesey (formerly Jenkins)* v *Jenkins* [1985] 1 All ER 106 (refd)
3 *Ette* v *Ette* [1965] 1 All ER 341 (refd)
4 *Barnes* v *Barnes* [1972] 3 All ER 872 (folld)
5 *Allen* v *Allen* [1985] 1 All ER 93 (folld)
6 *Cooke* v *Head* [1972 2 All ER 38 (refd)
7 *Bernard* v *Josephs* [1982] 3 All ER 162 (refd)
8 *Millward* v *Millward* [1971] 1 WLR 142; [1971] 3 All ER 526 (refd)
9 *Davis* v *Davis* [1967] 1 All ER 123 (refd)
10 *Wachtel* v *Wachtel* [1973] 1 All ER 829 (distd)
11 *Jacqueline Bey* v *Edmond Lee Yok Lung* [1988] 2 MLJ 355 (distd)
12 *Krystman* v *Krystman* [1973] 1 WLR 927; [1973] 3 All ER 247 (refd)
13 *Lombardi* v *Lombardi* [1973] 1 WLR 127; [1973] All ER 625 (refd)
14 *Chambers* v *Chambers* (1980) 1 FLR 10 (refd)
15 *Fraser* v *Fraser* (1982) 3 FLR 98 (refd)
16 *Minton* v *Minton* [1979] AC 593 (refd)

Legislation referred to

Women's Charter (Cap 353, 1985 Ed) s 109(1), (2)
Matrimonial Proceedings and Property Act 1970 [UK] s 2

KS Chung for the appellant.
Ng Wing Cheong for the appellant.

Cur Adv Vult

Yong Pung How CJ (delivering the judgment of the court): This is an appeal against an order by Lai Kew Chai J in the High Court on 28 March 1989 in the following terms:

(1) that the respondent do pay to the appellant as from 1 June 1988 maintenance at the rate of $1,800 per month;
(2) that the respondent shall not be liable for the outgoings of No 14 Clover Way, Singapore with effect from 1 June 1988; and
(3) that the respondent shall hold the income of all his shares in the private companies listed in the schedule thereto as a trustee upon trust to pay the maintenance or any part thereof and, subject thereto, the respondent may beneficially deal with the residue, if any, of his income from the said shares. The sche-

dule referred to 411 shares in Tay Miang Huat Pte Ltd, 455 shares in Tay Miang Huat Distillery Pte Ltd, 249 shares in Tay Miang Guan & Co Sdn Bhd and 499 shares in Tong Ah Sdn Bhd.

The appellant being dissatisfied with the decision appealed to the Court of Appeal against the whole of the decision save and except the order as to costs. Essentially, the appeal was against the learned judge's maintenance order of $1,800 per month, and, secondly, against his refusal to exercise his discretion to grant the appellant a lump sum.

The basic facts have been summarized by Lai Kew Chai in his judgment in *Tay Cheow Seng* v *Lee Puey Hwa* ([1989] 3 MLJ 99). The respondent was granted a decree nisi on 4 September 1985 and on 23 December 1985 this was made absolute. After the commencement of the divorce proceedings, the appellant had obtained an order on 16 August 1985 for the respondent to pay her $1,000 per month pending the hearing of the petition. On 6 November 1987, when a summons taken out by the appellant was part-heard, the maintenance was increased by Lai Kew Chai J to $1,400 per month with effect from 1 November 1987, and the house in which the appellant and their daughter were living, No 14 Clover Way, was transferred to the appellant and the daughter as tenants in common in equal shares. The learned judge found that the appellant had made no provision for medical expenses, maintenance and outgoings for the house, and he ordered the respondent to pay for all the outgoings for the house which he found was in grave need of maintenance and repair. On 28 March 1989, at the adjourned hearing of the part-heard summons, the learned judge increased the appellant's maintenance from $1,400 per month to $1,800 per month with effect from 1 June 1988, but, at the same time, he relieved the respondent from his previous liability for the outgoings of No 14 Clover Way and his earlier order that the respondent pay for the outgoings was varied accordingly.

The appellant now asks this court for an order for payment of $760,347 by way of a lump sum, and pending payment, that the monthly maintenance should be kept up and this maintenance should not be less than $3,000 per month, on the basis of an order made against another advocate and solicitor by the previous Chief Justice on 12 February 1982. She contends that the respondent has at no time made a full and frank disclosure of his available assets which clearly are in excess of the $1,308,534.71 which have been admitted by him, and out of which a lump sum could be ordered. She points out that even after the judgment in March 1989, he had on 19 April 1989, barely three weeks after the judgment, sold a property 11 Binjai Walk for $1.54m; and on 28 April 1989, one month after the judgment, he had purchased another property 21J Mandalay Ville for a lady friend. Full and frank disclosure is important: *Robinson* v *Robinson*,[1] approved in *Livesey (formerly Jenkins)* v *Jenkins*;[2] and in its absence the court is entitled to draw inferences adverse to the husband as to his capacity or faculties and to treat him as a man in a position to command a very substantial income: *Ette* v *Ette*.[3] The appellant contends, therefore, that the learned judge erred in not granting a lump sum in that he failed to give any weight, or sufficient weight, to several factors — the respondent's failure to disclose assets; his available capital resources or liquidity; the appellant's lack of education which precluded her from effectively fending for herself; their respective contributions to the welfare of the family, particularly the appellant's continuing care of the child of the family; and that No 14 Clover Way has been in great need of maintenance and repairs.

Counsel for the respondent has submitted that the respondent left the family house at 147 Killiney Road which was their matrimonial home as early as 1965. He had gone and set up home with the party cited, whom he had since married, at No 11 Binjai Park, and before the divorce the respondent and the appellant had lived apart for more than 20 years. Since 1971, the appellant has lived with the daughter at No 14 Clover Way which the respondent bought for them with his share of the proceeds of sale of the family house at 147 Killiney Road. Since 1974, the respondent has given the appellant $800 per month as maintenance, and the question of maintenance or its sufficiency had never been raised until the divorce petition was filed in 1985. When the appellant, as a result of this, first applied to court in 1985 for maintenance, she particularized her monthly expenditure and needs at only $1,100 per month and asked for only $1,400 per month, following which she was given $1,000 per month pending the hearing of the petition. In 1981, the $1,000 per month was increased by Lai Kew Chai J to $1,400 per month. Finally, in March 1989, after a four-day hearing Lai Kew Chai J increased the sum again to $1,800 per month, but relieved the respondent from further liability for the outgoings of No 14 Clover Way. In making this order, the learned judge had already taken into account all the circumstances, financial and otherwise, of the parties. The appellant had produced no evidence to support the claim for $3,000 per month. On the other hand, the respondent had since remarried and now has two sons, who were at that time 16 and 19 years of age; the respondent had a maintenance order made against him recently to pay his wife and two sons a total of $3,500 maintenance per month and regard had to be given to his responsibilities to this other family: *Barnes* v *Barnes*;[4] *Allen* v *Allen*.[5] The property known as 11 Binjai Walk was acquired through the joint efforts of the respondent and the party cited, and they were therefore jointly entitled to the beneficial interest in it to the exclusion of the appellant: *Cooke* v *Head*[6] followed in *Bernard* v *Josephs*.[7]

As for a lump sum payment, counsel for the respondent cited *Millward* v *Millward*[8] in which Edmund Davies LJ cautioned that the making of lump sum orders (under s 2 of the English Matrimonial Proceedings and Property Act 1970) ought not to become commonplace and approved *Davis* v *Davis*[9] in which Willmer LJ said at p 126: ' ... an order for a lump sum payment can only properly be made against a husband possessed of sufficient capital assets to justify it'. *Wachtel* v *Wachtel*[10] was a case in which a lump sum payment was considered in relation to the matrimonial home as the principal asset, but in the present case the appellant and the daughter already had No 14 Clover Way which was worth $370,000. *Jacqueline Bey* v *Edmond Lee Yok Lung*[11] should be distinguished, because the matrimonial home had been sold and there was a risk that it could be difficult to contact the husband who travelled frequently. As the parties in the present case had been separated for a long time, this was a factor which should preclude the wife getting either a lump sum payment or maintenance: *Krystman* v *Krystman*;[12] *Lombardi* v *Lombardi*;[13] *Chambers* v *Chambers*;[14] and *Fraser* v *Fraser*.[15] The respondent had provided all the information which he could about his financial affairs. The shares which he held were in private family companies and were not readily disposable.

In the present case, the appellant's application for a lump sum payment was made under s 109 (1) of the Women's Charter (Cap 353, 1985 Ed) which reads:

> A maintenance order may provide for the payment of a lump sum or such periodical payment as the Court may determine.

This provision is different from that under s 2 of the Matrimonial Proceedings and Property Act 1970 in England which empowers the court on granting a decree of divorce to make orders for both hump sums and periodical payments.

A divorce puts an end to a marital relationship. Although in practice, questions of custody of children and access to them, division of matrimonial assets, and arrangements for maintenance, often force on the parties a residual relationship, there is every advantage to both parties to put a final end to this relationship and to achieve a clean break as soon as this is practicable: *Minton* v *Minton*.[16] In so far as maintenance of a spouse is concerned, the court's power to order a lump sum payment, as an alternative to periodical payments, makes it possible for a husband, who has the means to make a lump sum payment, to achieve a clean break, and is clearly a method which should be taken advantage of whenever this is feasible. In deciding whether to order a lump sum payment, the court should consider the individual circumstances of the parties, particularly the needs of the wife and the obligations and responsibilities of the husband, in addition to his assets, his earning capacity and other available resources. In any case, an order for a lump sum should not be made if the husband does not have adequate cash or other capital assets which can be readily disposed of, or if the slump sum payment or the disposal of assets will effectively cripple his earning power.

Even where a lump sum payment is considered, the making of the lump sum order is pre-eminently a matter of discretion for the judge hearing the application and a Court of Appeal will not interfere with an order made by a judge unless it is clear that the judge exercised his discretion on a wrong principle or, in exercising his discretion, has made a decision which is improper, unjust or wrong. In the present case, the learned judge noted that the appellant was asking for one-third of the 'capital worth' of the petitioner which she claimed was about $2.281m and, in other words, was asking that the respondent be ordered to pay her $760,347 as a lump sum. He noted that the appellant already had a half share in No 14 Clover Way which was valued at $370,000, the other half share being vested in her daughter and that in addition she was receiving a periodical payment. As to the respondent's other assets, he expressed the following views, with which were are in agreement:

> The [respondent's] wealth was largely inherited and his own acquisitions were achieved in the course of his professional practice, with considerable help from the party cited during a period when his marriage to the (appellant) was over to all intents and purposes. Further, his inheritance in the form of the shares in the private companies are all not easily realizable.

Accordingly, the learned judge was not prepared to exercise his discretion under s 109(1) but, being anxious to secure the payment of maintenance to the appellant, used the powers conferred on him by s 109(2) to order that the respondent should hold the income of all his shares in the private companies as a trustee upon trust to pay the maintenance ordered. We are satisfied that in the present case the learned judge took into account all relevant considerations before deciding not to make a lump sum order, and that his decision was correct.

The appellant has also appealed in the alternative against the maintenance awarded to her of $1,800 per month. To a large extent, the considerations which relate to the consideration of a lump sum payment are also relevant to the consideration of monthly maintenance. One of the appellant's contentions that she should have $3,000 per month, simply because a maintenance order for $3,000 per month was made against another solicitor in 1982, is not a contention over which this court need deliberate for long. In considering the figures, however, we have been concerned that the apparent increase of the monthly maintenance from $1,400 to $1,800 per month was offset by the amount of the outgoings for No 14 Clover Way which the appellant

would now have to bear and which would result in the $400 increase being reduced to $180. That the appellant will now have to bear these outgoings instead of the respondent is, in our opinion, a logical consequence of the transfer of the property to her and her daughter. The only question which remains is whether this court would be justified in disturbing the maintenance of $1,800 per month awarded by the learned judge. There had been two interim orders, and this was a final order made at the conclusion of the hearing after he had heard all the evidence and had made detailed calculations. Having regard to all the evidence, including the fact that the respondent is not working, that he is now saddled with another maintenance order for his other family, and that the assets in the private companies are not easily disposable, we are of the opinion that the maintenance ordered by the learned judge is not manifestly inadequate and that the appeal against this order should be dismissed with costs.

Appeal dismissed.

Solicitors: *Chung & Co; Ng & Ng.*

Reported by *Zarinah Marican*

Lim Tjoen Kong v A-B Chew Investments Pte Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 91 OF 1986
YONG PUNG HOW CJ, CHAN SEK KEONG AND CHUA JJ
5 JULY 1991

Evidence — 'Without prejudice' negotiations — Admissibility — Privilege from disclosure of without prejudice negotiations — Waiver of privilege — Evidence Act (Cap 97, 1990 Ed), s 23

The respondents (plaintiffs) commenced this action against the appellant (defendant) for damages for breach of contract, alleging in their statement of claim that the defendant had agreed to purchase shares from the plaintiffs. The defendant applied to strike out the action on the ground that the defendant was not in Singapore on the date the agreement was alleged to be made. The plaintiffs then applied for summary judgment. An affidavit was filed by the managing director of the plaintiffs, one CBG, and in reply, one JK, the defendant's personal secretary, filed an affidavit on 12 March 1986 which alleged that negotiations had taken place between the plaintiffs and himself regarding the sale of shares and that one Irwan Gozali ('IG') had agreed to buy the shares. CBG then swore an affidavit in reply on 3 May 1986 which referred to negotiations between the defendant, JK and another person on the methods of payment for the shares. On 17 May 1986, CBG swore another affidavit which gave more details of the negotiations which the plaintiffs alleged took place.

The defendant took out an application to strike out and/or delete from the records of the court para 11 of CBG's affidavit of 3 May 1986 and paras 4 and 5 of CBG's 17 May 1986 affidavit on the ground that these paragraphs referred to negotiations between CBG on behalf of the plaintiffs and the defendant which the defendant claimed were made without prejudice. The assistant registrar allowed the application. The plaintiffs' appeal to the High Court was allowed (see [1989] 3 MLJ 328). The defendant appealed.

Held, dismissing the appeal:

(1) A literal reading of s 23 of the Evidence Act (Cap 97, 1990 Ed) suggests that the privilege from disclosure of without prejudice negotiations is confined to the parties to the action (and their solicitors or agents).

(2) In this case, there is a dispute as to the nature of the negotiations and the parties thereto. If a party to an action seeks to adduce in evidence without prejudice negotiations with the other party, the other party is entitled to either object to such evidence being admitted or allow it to be admitted and/or giving his own version of the negotiations. In the latter case, the evidence becomes admissible because there is a waiver of privilege by both the parties.

(3) Where, as in this case, there is a dispute on whether the negotiations referred to by the defendant are the same negotiations as claimed by the plaintiffs, the court must first resolve this preliminary issue of fact. If the plaintiff's version is true, the privilege from disclosure has been waived by the defendant by his adducing an untrue version thereof. If the defendant's version is true, then the question arises whether the second set of negotiations is subject to privilege.

(4) In this case, the issue of admissibility has been decided purely on legal arguments without reference to what the factual situation was, and on this ground alone, the assistant registrar's decision was wrong. This was an application to strike out the relevant paragraphs in CBG's affidavits which sought to introduce the plaintiff's version of the negotiations. It was not proper to strike out these paragraphs in the absence of a finding that there were two sets of negotiations, that the second set of negotiations was privileged from disclosure and that the defendant had not waived the privilege. Accordingly, the matter must now go before the registrar for him to determine the preliminary issue of fact as to which of the two versions of the negotiations is true.

Cases referred to

1 *La Roche* v *Armstrong* [1922] 1 KB 485 (refd)
2 *Rush & Tompkins Ltd* v *Greater London Council & Anor* [1988] 3 All ER 737 (distd)
3 *Walker* v *Wilsher* (1889) 23 QBD 335 (refd)
4 *Wf Alan & Co Ltd* v *El Nasr Export & Import Co* [1972] 2 All ER 127 (distd)
5 *Sobell* v *Boston & Ors* [1975] 2 All ER 282 (distd)

Legislation referred to

Evidence Act (Cap 97, 1990 Ed) s 23

Appeal from: Suit No 10980 of 1985 (High Court, Singapore)

Harry Wee (*Robin Lim* with him) for the appellant.
K Chettiar (*Dr Myint Soe* with him) for the respondents.

Cur Adv Vult

Chan Sek Keong J (delivering the judgment of the court): This appeal raised a number of issues relating to the admissibility in evidence of 'without prejudice' negotiations between the parties and their agents. At the conclusion of the hearing on 14 May 1991, we